IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 62

NATHAN JACKSON,

Petitioner,

v.

WILFRED DENNO, Warden,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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INDEX

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

CASES:

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Summary Statement of the Case

Petitioner, Nathan Jackson, was indicted by the grand jury of Kings County, New York, for the crime of murder in the first degree. On trial in the County Court of Kings County, the prosecutor introduced into evidence a confession made by Petitioner to an assistant district attorney of Kings County. At the time of this confession, Petitioner was hospitalized awaiting an operation for bullet wounds in the liver and lung (R. 13-15, 113-15). He had lost a considerable amount of blood (R. 15, 19, 115, 120) and, immediately prior to this confession, had been given doses of the drugs demerol and scopolamine (R. 17, 18). Petitioner had also been refused water (R. 65, 105, 114, 123-29).

Petitioner's trial counsel, after hearing testimony concerning the use of drugs, objected to the use of Petitioner's confession (R. 20, 27). The trial judge did not exclude the confession but rather, in his charge, instructed the jury that they were the arbiters of the question of the confession's voluntariness. If they found the confession to have been involuntary they would, they were instructed, have to disregard it and convict, if at all, only on the basis of other evidence in the record (R. 21-22).

The jury found Petitioner guilty of first-degree, premeditated murder, and the trial judge imposed the then mandatory sentence of death. The New York Court of Appeals affirmed Petitioner's conviction without opinion, 10 N.Y. 2d 780, 177 N.E. 2d 59 (1961), and denied his motions for reargument. 10 N.Y. 2d 885, 178 N.E. 2d 234 (1961), 11 N.Y. 2d 798, 181 N.E. 2d 854 (1962). The New York Court of Appeals granted Petitioner's motion to amend the remittitur to indicate that, in reviewing the question of voluntariness of Petitioner's confession, it had passed on questions under the due process clause of the Fourteenth Amendment to the Constitution of the United States. 10 N.Y. 2d 816, 178 N.E. 2d 234 (1961). This Court denied certiorari, 368 U.S. 949 (1961), and Mr. Justice Harlan denied Petitioner's request for a stay of execution in order to file a second petition for certiorari. 82 Sup. Ct. 541 (1962).

Petitioner filed the habeas corpus petition which is the basis for the present action in the United States District Court for the Southern District of New York. In considering the petition, the District Court heard oral argument, accepted briefs, and reviewed the entire New York record on appeal. The District Court refused to accord Petitioner a hearing and denied his petition, with an opinion. 206 F. Supp. 759 (S.D.N.Y. 1962) (R. 2-9). Subsequently, the

District Court certified that there was probable cause for an appeal and granted Petitioner's motion to appeal *in forma pauperis* (R. 1). The District Court's denial of the petition was affirmed, with an opinion, by the United States Court of Appeals for the Second Circuit. 309 F. 2d 573 (2d Cir. 1962) (R. 24-32).

Thereafter Petitioner filed in this Court a motion for leave to proceed *in forma pauperis* and a petition for certiorari. On January 21, 1963, this Court entered an order in the present case granting the motion for leave to proceed *in forma pauperis* and granting the petition for certiorari. 371 U.S. 967 (1963) (R. 162).

Opinion Below

The order of the United States Court of Appeals for the Second Circuit affirming the order of the United States District Court for the Southern District of New York denying Petitioner's application for a writ of habeas corpus appears as *Jackson* v. *Denno*, 309 F. 2d 573 (2d Cir. 1962) (R. 24-32), affirming 206 F. Supp. 759 (S.D.N.Y. 1962) (R. 2-9).

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1).

Constitutional and Statutory Provisions Involved

This appeal involves Section 1 of the Fourteenth Amendment, U.S. Const., and the hearing provisions of the Judiciary Article pertaining to habeas corpus proceedings, 28 U.S.C. § 2243. These provisions are set forth in the Appendix *infra*.

Questions Presented

I. Does a state criminal procedure which leaves solely to the jury the factual determination of the voluntariness of a confession violate the Fourteenth Amendment and thereby vitiate a conviction? Should *Stein* v. *New York*, 346 U.S. 156 (1953), be overruled?

II. In the present case, was Petitioner's confession involuntary as a matter of law, and did its admission into evidence therefore vitiate his conviction?

III. In the present case, did the refusal of the courts below to accord Petitioner a hearing on his application for a writ of habeas corpus deprive Petitioner of his rights in violation of the federal statute governing such matters? Does *Townsend* v. *Sain*, 372 U.S. 293 (1963), require a hearing in the present case?

Summary of Argument

This case presents the issue whether *Stein* v. *New York*, 346 U.S. 156 (1953), should be overruled. The New York criminal procedure sanctioned by that case—which allocates to the jury rather than the trial judge the function of determining the voluntariness of a confession, and which thus permits the conviction of criminal defendant despite the introduction into evidence of a confession which the jury may find to have been coerced—is totally at odds with the Constitutional antagonism toward involuntary confessions that has long been recognized by this Court. The *Stein* case, which sanctioned such a procedure, is an aberration in this Court's development of consistent, Constitutional protection of criminal defendants in state courts, and should be overruled forthwith.

This case also presents the question whether Petitioner's confession was involuntary as a matter of law and must therefore vitiate Petitioner's conviction. The confession was involuntary in that it was obtained by the prosecutor's taking advantage of Petitioner at a moment of extreme misery and degradation.

If the complete relief which Petitioner seeks should not be available, he should nevertheless be accorded a hearing on the merits of his habeas corpus application. The present case presents a situation in which, in the words of this Court in *Townsend* v. *Sain*, 372 U.S. 293, 313 (1963), "material facts [concerning voluntariness] were not adequately developed at the state court hearing." These facts concern the effect two drugs—demerol and scopolamine—had on Petitioner's ability to resist interrogation.

ARGUMENT

I.

The Fourteenth Amendment Requires That the Judge in a State Criminal Trial Determine as a Matter of Fact Whether a Confession Is Voluntary and, if It Is Not, Exclude It From the Evidence Presented to the Jury.

A pillar of the due process protection afforded criminal defendants in state courts is the Constitutional abhorrence of involuntary confessions. Application of the principle, first recognized in *Brown* v. *Mississippi*, 297 U.S. 278 (1936), that an involuntary confession admitted into evidence vitiates a state conviction, has through the years received considerable attention from this Court. We know today that the basis for this rule is that "the methods used to extract [involuntary confessions] offend an underlying principle in the enforcement of our criminal law: that ours

is an accusatorial and not an inquisitional system. . . . " *Rogers* v. *Richmond*, 365 U.S. 534, 541 (1961).

It is then surprising that this Court rendered the decision that it did in *Stein* v. *New York*, and, indeed, more surprising that the decision should still stand. It is true that the extreme interpretation that the dissenting members of this Court in the *Stein* case feared might be given to that decision has not materialized. *Stein* v. *New York*, 346 U.S. at 199-206. We know now that *Stein does not* stand for the proposition that a conviction will stand despite the introduction of a coerced confession if there is sufficient other evidence; on the contrary, nothing will save the conviction if the admitted confession was involuntary as a matter of law. *Lynumm* v. *Illinois*, 372 U.S. 528 (1963); *Spano* v. *New York*, 360 U.S. 315 (1959); *Payne* v. *Arkansas*, 356 U.S. 560 (1958). This Court has, however, in dictum indicated that *Stein* remains a viable precedent for permitting the submission to a jury of any confession concerning which voluntariness is a fair question of fact. *Spano* v. *New York*, 360 U.S. at 324.

If *Stein* v. *New York* has not proven to be as destructive of the exclusionary rule as many had feared, it nevertheless is still not possible to reconcile that case with a developed principle of due process in state criminal proceedings. This is so because there can be no valid Constitutional distinction justifying different treatment of confessions that are involuntary as a matter of law and confessions that are involuntary "merely" as a matter of fact. Moreover, it defies human experience to expect limiting instructions to prevent a jury in its determination of guilt to be uninfluenced by the existence in evidence of a confession which it in fact finds to have been involuntary. Nor, for that matter, is it reasonable to believe that the jury's determination of the question of a confession's voluntari-

ness will not be swayed by any other evidence of the defendant's guilt.

A compelling reason for overruling *Stein* v. *New York* is that it attempted to restrict the basis for the exclusionary rule to considerations of evidentiary reliability. 346 U.S. at 192. This was a calculated departure from this Court's earlier unwillingness to permit a conviction to stand upon an involuntary confession even when the conviction was reliably buttressed by sufficient other evidence. *Brown* v. *Allen*, 344 U.S. 443, 475-76 (1953); *Malinski* v. *New York*, 324 U.S. 401 (1945). And now this Court has made it abundantly clear that *Stein* erred in this respect; the rationale for the exclusionary rule is not the untrustworthiness of evidence obtained involuntarily but rather the "impermissible methods" used to obtain such evidence. *Rogers* v. *Richmond*, 365 U.S. at 540-41; *Mapp* v. *Ohio*, 367 U.S. 643, 656 (1961). This development would seem concomitantly to demand the exclusion from evidence of any confession that is, as a matter of fact, involuntary. It defies logic and consistent application of Constitutional principle to exclude confessions that a judge regards as "obviously" involuntary while admitting those that he would, if he were asked, characterize as "factually" involuntary.

The *Stein* aberration has been very severely criticized in the legal literature on the ground that it does not satisfy the Constitutional requirement of due process. See Meltzer, *Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury*, 21 U. Chi. L. Rev. 317 (1954). By its terms this criticism is equally applicable under the restrictive meaning that *Stein* has been given by this Court's decisions in *Payne* v. *Arkansas*, *supra*, and *Spano* v. *New York*, *supra*. Professor Edmund Morgan has stated that:

"The case of a confession induced by physical or mental coercion deserves special mention. The protection which the orthodox rule or the Massachusetts doctrine affords the accused is of major value to him. A fair consideration of the evidence upon the preliminary question is essential; in this consideration the truth or untruth of the confession is immaterial. Due process of law requires that a coerced confession be excluded from consideration by the jury. It also requires that the issue of coercion be tried by an unprejudiced trier, and, regardless of the pious fictions indulged by the courts, it is useless to contend that a juror who has heard the confession can be uninfluenced by his opinion as to the truth or falsity of it. Neither the due process clause of the Federal Constitution nor any other of its provisions requires any particular division of function between judge and jury. The result is that in New York and in a few other jurisdictions, the orthodox rule has been abandoned in the one situation where it is most needed. The rule excluding a coerced confession is more than a rule excluding hearsay. Whatever may be said about the orthodox reasoning that its exclusion is on the ground of its probable falsity, the fact is that the considerations which call for the exclusion of a coerced confession are those which call for the protection of every citizen, whether he be in fact guilty or not guilty. And the rule of exclusion ought not to be emasculated by admitting the evidence and giving to the jury an instruction which, as every judge and lawyer knows, cannot be obeyed." Morgan, *Some Problems of Proof Under the Anglo-American System of Litigation* 104-05 (1956).

A Constitutionally adequate rule for determining the admissibility of an allegedly coerced confession must invest the trial judge with the responsibility for making a factual determination of admissibility, out of hearing of the jury. The question whether or not thereafter, in the event of a finding of admissibility, the same factual question should be submitted to the jury does not, in counsel's opinion, rise to a Constitutional issue. However, this Court should know that there is at least one expert who has concluded that the apparent added protection for an accused from the so-called "Massachusetts" variant of the orthodox rule—which requires the jury to be given a "second bite" at the issue of voluntariness—is really illusory. The Massachusetts variant, he has argued, makes it not unlikely that the trial judge will avoid difficult factual questions concerning voluntariness by passing them to the jury, and thereby cause the same deprivation of due process that now exists when the New York procedure is followed. Meltzer, *supra* at 329-30.

There is no reason to believe that holding the New York procedure unconstitutional would have any but a salutary effect on the administration of criminal justice. While the "New York" procedure is today followed in a substantial number of jurisdictions, it has not by any means secured overwhelming acceptance. Nor has it been approved by leading authorities on the law of evidence. An impressive array of such authorities have in fact taken the position that, given the exclusionary rule, the factual question of voluntariness should logically be for the judge. 3 Wigmore, *Evidence* § 861 (3d ed. 1940); McCormick, *Some Problems and Developments in the Admissibility of Confessions*, 24 Texas L. Rev. 239, 251 (1946); Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact*, 43 Harv. L. Rev. 165-89 (1929).

Moreover, the National Conference of Commissioners on Uniform State Laws has adopted the exclusionary rule and would have the judge alone apply it. National Conference of Commissioners on Uniform State Laws, Uniform Rules of Evidence, rule 8 (1953).

II.

Petitioner's Confession Was Involuntary as a Matter of Law.

Although the earliest involuntary confession case in which this Court voided a state conviction involved the use of brute force, *Brown* v. *Mississippi*, 297 U.S. 278 (1936), the proscribed conduct in other cases has consisted of less barbarous, but no less effective, forms of pressure: For example, false sympathy, *Spano* v. *New York*, 360 U.S. at 323; deprivation of clothing, *Malinski* v. *New York*, 324 U.S. at 405-07; isolation and persistent questioning, for five hours, of an unrepresented adolescent, *Haley* v. *Ohio*, 332 U.S. 596, 599-601 (1948); and use of a psychiatrist, *Leyra* v. *Denno*, 347 U.S. 556, 559-62 (1954).

The circumstances under which Petitioner's confession was taken by the assistant district attorney were as degrading and coercive as any of those described above. Petitioner, lying in a hospital bed, had been severely wounded only a few hours earlier (R. 35, 39, 51) and was shortly to undergo a life-saving three-hour operation (R. 14, 115). He had lost a considerable amount of blood (R. 19, 120), was having trouble breathing (R. 65) and, for whatever reason, had been deprived of water (R. 66, 123-24). He apparently faced the interrogators who stood over him (R. 58-59) without assistance from any quarter —the trial record being devoid of any indication that he

had with him friend or counsel or had been advised of his legal rights.* The failure of the record to show these facts is very significant, since Petitioner had earlier given a confession to a police detective, and it was the police who then caused the assistant district attorney to come to the hospital room in which Petitioner was confined (R. 34-44). Petitioner was thus for all intents and purposes "an accused" at the time of his interrogation by the assistant district attorney. Given these facts, it is difficult to understand how the prosecution could have begun to meet its burden of proving voluntariness without showing that Petitioner had some impartial assistance during his interrogation. Cf. *Haynes* v. *Washington*, 373 U.S. 503, 516-17 (1963).

That the circumstances by which Petitioner had been placed in a position where he lacked power to resist interrogation were for the most part not the work of police or prosecutor does not in any way diminish the deprivation of Petitioner's Constitutional rights. This Court has long recognized that it is the nature, rather than the cause, of a defendant's impaired mental condition that determines whether a confession has been involuntary. See e.g., *Gallegos* v. *Colorado*, 370 U.S. 49, 52-55 (1962); *Reck* v. *Pate*, 367 U.S. 433, 440-43 (1961); *Culcombe* v. *Connecticut*, 367 U.S. 568, 620-27 (1961); *Fikes* v. *Alabama*, 352 U.S. 191, 197-98 (1957); *Haley* v. *Ohio*, 332 U.S. 596, 599-601 (1948); *Ziang Sung Wan* v. *United States*, 266 U.S. 1, 13-14 (1924). Moreover, in cases in which the defendant's physical and mental condition have made him less able to withstand interrogation, this Court has weighed heavily the lack of assistance to the accused from either friend

* The trial judge indicated that he regarded as inadmissible, or at least immaterial, evidence of lack of counsel under such circumstances (R. 46).

or counsel. *Gallegos* v. *Colorado, supra; Reck* v. *Pate, supra; Culcombe* v. *Connecticut, supra.* The Constitutional, and moral, basis for the exclusionary rule requires its operation regardless of whether the state creates the defendant's misery and degradation or callously takes advantage of it. In either case a grievous offense has been committed against human dignity.

III.

Petitioner Should Be Accorded a Hearing to Determine the Effect Drugs Had on His Capacity to Make a Voluntary Confession.

In Petitioner's application for a writ of certiorari it was asserted that in one respect the present case was identical with *Townsend* v. *Sain,* 372 U.S. 293 (1963), which was then pending before this Court. Petitioner believes that this Court's subsequent decision and opinion in *Townsend* establish conclusively that the courts below in the present case erred in refusing to grant Petitioner a hearing.

In its *Townsend* opinion, this Court described six situations in which a right to a hearing exists in a habeas corpus proceeding. 372 U.S. at 313. The present case fits squarely into one of these—that in which "material facts were not adequately developed at the state court hearing."

The particular issue on which a hearing is required concerns the effect two drugs—demerol and scopolamine—had on Petitioner's ability to resist or recall the interrogation that produced his confession. According to undisputed evidence in the record, Petitioner was given, immediately prior to his interrogation by the assistant district attorney, 50 milligrams of demerol and 1/150 of a grain of scopola-

mine* (R. 18, 118). The hospital physician who had attended Petitioner testified that demerol made one "dopey." He also testified that demerol normally required 15 minutes to be effective, but he admitted that this period might vary, although "not much," for a person in Petitioner's injured condition (R. 19, 119). The attending physician's estimate is in conflict with medical evidence, reported in a recent case, that the drug may be fully effective in 5 minutes. *Griffith* v. *Rhay*, 282 F. 2d 711, 714 (9th Cir. 1960). It also ignores the important question of how demerol is administered—a matter on which the state record in the present case sheds no light. If administered intravenously, the drug normally takes effect immediately. Hori and Gold, *Demerol in Surgery and Obstetrics*, 51 Canadian Medical Association J. 509, 511 (1944).

There is no doubt that, as was testified at the trial, demerol causes drowsiness and impairs alertness. It was not revealed at the trial, however, that scopolamine when administered in combination with demerol intensifies the normal effects of the latter. Rovenstine and Batterman, *The Utility of Demerol as a Substitute for Opiates in Preanesthetic Medication*, 4 Anesthesiology 126, 132 (1943); Osol, Farrar and Pratt, *op. cit. infra* at 1222. Nor was it revealed at the trial that while demerol alone has little amnestic effect, when it is administered in combination with scopolamine in the amount Petitioner received, the amnestic effect is pronounced. Total loss of

* The physician who had attended Petitioner read from the hospital record that Petitioner had received "50 mgm" of demerol and "1/150 gr." of scopolamine. He "guessed", erroneously, that "gr." meant gram; on the contrary, the size and use of the fractional amount indicates that the dose was measured in grains. Osol, Farrar and Pratt, 1 *The Dispensatory of the United States of America* 1223 (25th ed. 1955). An equivalent amount would be 0.4 mgm.

recall occurs in a large percentage of cases and partial loss in most of the remainder. Hori and Gold, *supra* at 512-13. The narcotic stupor produced by this drug combination blunts, but does not abolish, consciousness, "so that the patient can follow orders." Sollmann, *A Manual of Pharmacology and Its Application to Therapeutics and Toxicology*, 323-24, 254-55 (7th ed. 1948). These facts may well explain Petitioner's persistent inability in his trial testimony to recall any of the questions or answers made during his hospital interrogation by the assistant district attorney (R. 66, 107-11). In fact, his testimony indicates that, while he recalled being questioned by the police, he seemed to have no recollection at all of the subsequent interrogation.

No consideration was given at the trial to possible adverse effects of scopolamine. The only testimony relating to this drug was that of the attending physician who stated that it was used to "dry up the secretion of the throat and pharynges and the upper respiratory tract" (R. 17-18, 118). At no time was the trial court or jury given the crucially informative facts that scopolamine is a "cerebral sedative" and, very likely, a "cerebral depressant," Osol, Farrar and Pratt, *op. cit. supra* at 1222, and has the power to break down will and memory. *Townsend* v. *Sain*, 372 U.S. at 308; Sollmann, *op. cit. supra* at 323-24, 254-55; Hori and Gold, *supra* at 512. The absence of this information was particularly critical in view of the fact that the dose of scopolamine administered to Petitioner was almost twice as large as that which this Court held required a hearing in *Townsend* v. *Sain*, 372 U.S. at 302.

This failure of Petitioner's trial counsel to illuminate the effects of demerol and scopolamine cannot realistically

be regarded as Petitioner's fault. *Townsend* v. *Sain*, 372 U.S. at 302.

Given (1) the inconclusiveness and inadequacy of the evidence at the state trial concerning the effect of demerol on Petitioner and (2) the absence in the trial of any attempt to deal with the effect of scopolamine, it would seem that only through a hearing can Petitioner's Constitutional rights be safeguarded.

Conclusions

For the reasons stated the judgment of the court below should be reversed and the case remanded to the District Court with instructions to issue the writ and to order Petitioner's conviction to be set aside and that he be discharged from custody unless forthwith accorded a new trial; or, in the alternative, the judgment of the court below should be reversed and the case remanded to the District Court with instructions to accord Petitioner a hearing.

Respectfully submitted,

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Dated: August 23, 1963

APPENDIX

U. S. Const., Amendment XIV, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

United States Code, Title 28, Section 2243:

"A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."